No. 83-305

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,
v.
ALBERT WALTER TROMBETTA, et al.,
Respondents.

On Writ of Certiorari
To the California Court of Appeal,
First Appellate District

BRIEF OF THE STATE PUBLIC DEFENDER OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE AND CONSENT

The State Public Defender of California is an agency of California state government which is charged with the representation on appeal of indigent criminal defendants. The outcome of the instant case will have a substantial impact on the rights of persons represented by this office, as well as the public as a whole, to due process of law and to a fair trial. Accordingly, the State Public Defender of California is filing this brief amicus curiae in support of respondents herein.

This brief is filed pursuant to Rule 36 of the Rules of the Supreme Court of the United States. Consent to the filing of the brief has been given by counsel for all parties to the action. Written consent forms, signed by counsel for each of the parties, accompany this brief.

SUMMARY OF ARGUMENT

This case concerns whether the state has a duty to preserve breath samples it collects for later analysis and testing by the defendant in a criminal prosecution for driving under the influence of alcohol. Petitioner below took the position that the state need not take any steps to afford the defendant access to this critical evidence of blood alcohol concentration which it demands from the defendant. Now, on the merits, petitioner broadens substantially the nature of the remedy sought and asks this Court to rule that federal due process has never included a duty to preserve evidence.

A decisive intervening change in California statutory law, however, has made it unnecessary for this Court to reach any of these issues. Before the instant case was ever applied to anyone, the California Legislature wisely enacted California Vehicle Code §13353.5, requiring that a suspect arrested for driving under the influence must be informed that any breath sample collected will not be preserved, and that he or she may either waive this infirmity or, alternatively, choose a blood or urine test. This critical intervening statutory change vitiates the impact of any decision this Court may render in the case at bar. Amicus therefore first argues that this Court

should dismiss the writ of certiorari as improvidently granted since the effect of the change in statute is now in proper focus.

Second, amicus argues that careful consideration of the underpinnings of the decision below demonstrates it rests on adequate state grounds. Intervening decisional law further clarifies that California's approach to the duty to preserve evidence has, in effect and practice, become a California doctrine of independent existence. For this reason also, the writ of certiorari should be dismissed as improvidently granted.

Should this Court reach the merits, amicus contends in Argument III that the decision in *Brady v. Maryland,* 373 U.S. 83 (1963) made it clear that federal due process does require the state to preserve material evidence in its possession. Because evidence of a suspect's blood alcohol concentration is manifestly material in a prosecution for driving under the influence of alcohol, the duty to preserve encompasses the preservation of breath samples the state forces a person to produce.

Finally, amicus briefly concludes that whether the behavior involved in this case is characterized as "gathering" or "preserving" evidence, the limited nature and scope of the case at bar require this Court to construe federal due process to allow the defendant access to this undeniably crucial evidence.

SUMMARY OF CASE

An individual arrested for driving under the influence of alcohol is required to submit to a blood, breath or

urine test. Failure to submit results in the loss of one's driver's license and the use of the refusal to establish consciousness of guilt at any subsequent trial on the matter. California Vehicle Code §13353; see *People* v. *Sudduth*, 65 Cal.2d 543, 421 P.2d 401, 55 Cal.Rptr. 393 (1966).[1]

Respondents, like most individuals in California similarly arrested, submitted to a breath test after their arrest for driving under the influence of alcohol. They were tested on an Omicron Intoxilyzer. Each respondent's breath registered an alcohol level of at least 0.10.[2] None of the breath samples was preserved for later testing by the respondents. J.A. 153–54, 158.

The Intoxilyzer, by definition and manufacturer's description, *collects* breath samples blown by the subject into its chamber. J.A. 155, 178, 244. An infrared light is used to test the alcohol level and the results of the two required breath samples are indicated on a printout card. J.A. 155.

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[1] A suspect has no constitutional right to refuse to give a breath sample. *Ibid.*; see *Schmerber* v. *California*, 384 U.S. 757 (1966).

[2] Former California Vehicle Code §23102(a), under which respondents were prosecuted, proscribed misdemeanor driving under the influence of intoxicating liquor. Former California Vehicle Code §23126(a)(3), created a presumption of impairment due to alcohol where the accused's blood alcohol concentration (BAC) was 0.10 or greater.

On January 1, 1982, California Vehicle Code §23152(b) became effective, making it unlawful for any person who has 0.10 percent or more, by weight, of alcohol in his or her blood to drive a vehicle. It is no longer necessary to prove that the defendant was in fact under the influence; the state need only establish beyond a reasonable doubt that at the time of driving, the defendant's BAC was or exceeded 0.10 percent. *Burg* v. *Municipal Court*, 35 Cal.3d 257, 673 P.2d 732, 198 Cal.Rptr. 145 (1983).

Since 1973, the California State Department of Health has given official approval to a breath collection device known as the Intoximeter Field Crimper-Indium Tube Encapsulation Kit (hereinafter referred to as the "Kit"). J.A. 175–76. The Kit does not test but instead collects breath. The subject blows into an indium tube which captures the breath sample for later analysis and is capable of holding the breath sample in three separate compartments. J.A. 156. These compartments can then be placed in one of two state approved gas chromatographs for BAC testing. J.A. 156, 186, 242–44. Breath samples stored in the Kit can be tested accurately for up to 90 days and even a year. J.A. 184–186. The Kit itself is reusable and costs $200.00; the indium tubes for each subject cost about $14.00. J.A. 179.

It was stipulated between the parties that the Kit was "on the market and available to the State if it were required to use [it]" J.A. 167, 182–83. Despite the availability of the Kit, officers in the instant cases did not use it. They instead used an Intoxilyzer which they operated in such a fashion as to release the breath sample after obtaining an analysis of the breath's alcohol concentration.

ARGUMENT

I.

THE WRIT OF CERTIORARI SHOULD BE DISMISSED BECAUSE AN INTERVENING CHANGE IN STATUTORY LAW HAS OBVIATED THE IMPACT OF ANY DECISION THIS COURT MIGHT RENDER

None of the respondents herein was told that a breath

sample would be saved. J.A. 154. At the time these cases arose, there was no statutory requirement that persons arrested for driving under the influence be so informed. However, on September 15, 1983, four months before certiorari was granted, the California Legislature enacted new California Vehicle Code §13353.5 [3] (hereinafter cited as §13353.5), which provides as follows: [4]

> (a) In addition to the requirements of Section 13353, a person who chooses to submit to a breath test shall be advised before or after the test that the breath-testing equipment does not retain any sample of the breath and that no breath sample will be available after the test which could be analyzed later by the person or any other person.
>
> (b) The person shall also be advised that, because no breath sample is retained, the person will be given an opportunity to provide a blood or urine sample that will be retained at no cost to the person so that there will be something retained that may be subsequently analyzed for the alcoholic content of the person's blood. If the person completes a breath test and wishes to provide a blood or urine sample to be retained, the sample shall be collected and retained in the same manner as if the person had chosen a blood or urine test initially.

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[3] Stats. 1983, chap. 841, p. ____, §1, urgency.

[4] Section 4 of Stats. 1983, chap. 841, p. ____, provides in pertinent part: "In order to provide a constitutional procedure for administering the breath test in light of the decision of the court of appeal in People v. Trombetta (1983), 142 Cal. App.3d 138, it is necessary that this act take effect immediately."

(c) The person shall also be advised that the blood or urine sample may be tested by either party in any criminal prosecution. The failure of either party to perform this test shall place no duty upon the opposing party to perform the test nor affect the admissibility of any other evidence of the alcoholic content of the blood of the person arrested.

This section was enacted expressly to deal with *Trombetta's* holding that the Omicron Intoxilyzer's failure to preserve the breath sample or its equivalent violated due process. See, *supra,* n. 4. Section 13353.5 operates to save the use of the Intoxilyzer, and arguably of any other breath-testing device, by informing subjects of its constitutional infirmities so that they may make an *informed* choice whether to waive their constitutional right to preservation of a breath sample.

The enactment of §13353.5 resolves the *"Trombetta"* issue for all drunk driving cases arising after September 15, 1983. Obviously, if a suspect is fully informed pursuant to the statute's directive, and then chooses to waive his or her due process right to a preserved breath sample, the subsequent use of the Intoxilyzer is permissible. On the other hand, should the arrestee choose the option of preserving the evidence of the BAC, he or she may submit to a blood or urine test. The choice in either event is now properly in the hands of the accused.

Most importantly, the enactment of §13353.5 means that the *only* persons who will be affected by any decision on the merits this Court renders herein will be the respondents.[5]

[5] The decision in *Trombetta* expressly applied only to respondents herein and to those "tests performed after this decision has

It is well settled that where a change in the law has occurred prior to this Court's grant of a writ of certiorari, and, had it been fully aware of the implications of such a change the Court would not have granted certiorari, the writ of certiorari should be dismissed as improvidently granted. *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1954); *Piccirillo* v. *New York*, 400 U.S. 548 (1971); *Cook* v. *Hudson*, 429 U.S. 165 (1976); see, Annot. 30 L.Ed.2d 829, 854 (1972).

In the leading case of *Rice* v. *Sioux City Memorial Park Cemetery, Inc., supra,* this Court considered the effect of an intervening change in the law upon the grant of certiorari. There, the plaintiff had sued in Iowa state court for mental suffering from the defendant's refusal to bury her husband. Plaintiff relied upon a clause in the contract which she alleged was void under federal and state constitutions. The case was dismissed by the state court and the dismissal affirmed by the Iowa Supreme Court. This Court granted certiorari, and affirmed the judgment.

On petition for rehearing, however, this Court reviewed its original decision to grant certiorari in light of an intervening Iowa statute and dismissed the writ of certiorari as improvidently granted. The Court noted

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become final". J.A. 160. In California, a decision is not final until the remittitur issues from the reviewing court. See Cal. R. Ct. 25(a). The court of appeal granted an indefinite stay of the issuance of the remittiturs on August 31, 1983. See, Brief for Petitioner at 2. Section 13353.5 became effective September 15, 1983. Therefore, the only persons who would be affected by a decision on the merits in the instant cases are the respondents, assuming they are included in any relief this Court might issue.

that although the statute was in existence at the time the case first came to it, the effect of the statute on the issues before it was obscured by certain constitutional issues "for which our interest was enlisted". (*Id.*, at 73.)

> *This Iowa statute bars the ultimate question presented in this case from again arising in that State.* In light of this fact and the standards governing the exercise of our discretionary power of review upon writ of certiorari, we have considered anew whether this case is one in which "there are special and important reasons" for granting the writ of certiorari as required by Supreme Court Rule 10.

Ibid., (emphasis added).

The Court's interpretation in *Rice* of the "special and important reasons" requirement is particularly apposite to the instant case. It emphasized that although a "federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem" this Court is not a forum for the pursuit of scholarly interests. *Id.*, at 74. "Nor does it sit for the benefit of the particular litigants." *Ibid.*, (citations omitted).

> "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

Ibid. [6]

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[6] Similarly, in *Cook* v. *Hudson, supra,* certiorari was granted to consider whether under the First and Fourteenth Amendments,

Instructive in the case at bar is the concurring opinion by Mr. Justice Harlan in *Triangle Improvement Council* v. *Ritchie*, 402 U.S. 497 (1971), where this Court per curiam, dismissed the writ of certiorari as improvidently granted. Four events since the granting of certiorari rendered the case "wholly inappropriate for review", including the passage of a new statute that drastically altered the potential impact of any decision the Court might reach in the case. *Id.*, at 498–99. For this reason, Mr. Justice Harlan found the case to be "a classic instance of a situation where the exercise of our powers of review would be of no significant continuing national import". *Id.*, at 499; see also, *Piccirillo* v. *New York, supra.*

Like the statutes in the foregoing cases, §13353.5 eviscerates the potential impact of any decision this Court might render herein. The statute was enacted after these proceedings commenced and, as in *Rice, supra,* 349 U.S. at 73, and *Cook, supra,* 429 U.S. at 165, was in existence at the time the Court granted the writ of certiorari. Although brief mention was made of the existence of the statute in respondents' brief in opposition to the petition, no authority was cited, nor was argument or legal theory tendered as to the impact of the statute on the exercise of this Court's discretion under Supreme Court Rule 17. Brief in Opposition 21–22; see *Rice* v.

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a Mississippi public school board may fire its teachers for sending their children to a private racially segregated school. Subsequent to the initiation of litigation, the Mississippi legislature enacted a statute, apparently in response to *Cook*, which prohibited school boards from denying employment to a person on the grounds that any eligible child of such a person did not attend the public school system. 429 U.S. at 166–167. This key intervening development as well as a subsequent case considered at oral argument, satisfied this Court that the writ should be dismissed. *Id.*, at 166.

Sioux City Cemetery, supra, 349 U.S. at 75. Notably, only passing reference to the statute is made in petitioner's brief on the merits. Brief for Petitioner at 20, n. 13; 21, n. 15.

It is significant that the existence of this sound reason to decline certiorari may not have originally been "seen in proper focus" because it was "blanketed" by the constitutional issues raised by the petition for writ of certiorari. *Rice, supra,* 349 U.S. at 73. Moreover, the effect of this critical change in the law has been further obscured by petitioner's assertion of a "parade of horribles" sure to result should this Court not act. See e.g., Petition for Writ of Certiorari 12–15, 27–28. In short, the importance of the new statute "was not put in identifying perspective" by either party. *Rice, supra,* 349 U.S. at 75.

Finally, as an additional factor weighing strongly in favor of the dismissal of the writ of certiorari, amicus notes that petitioner in its brief on the merits, now seeks to broaden substantially the nature of the remedy it originally sought in the petition for writ of certiorari. See, *Triangle Improvement Council* v. *Ritchie, supra,* 402 U.S. at 499, 501–02 (Harlan, J., concurring). Thus, the original petition declared that the questions presented were 1) whether *"the duty to preserve evidence under federal due process"* forbids the use of machines like the Intoxilyzer; and 2) whether *"the duty to preserve evidence under federal due process"* compels law enforcement to gather evidence. Petition for Writ of Certiorari, "Questions Presented" (emphasis added). Now, on the merits and for the very first time in the history of these proceedings, petitioner primarily argues that there *is* no duty to preserve evidence under federal due process and that this Court should so hold. Brief for Petitioner at 8–21. As Mr. Justice Harlan observed, such a change of posture is troublesome and renders adjudication on

the merits an improvident expenditure of the energies of the Court. *Id.*, at 501-02.

In sum, it is now clear that because of this intervening statutory addition, the most persons affected by this Court's ruling will be the handful of respondents appearing in these cases. The exercise of "sound judicial discretion" which governs the exercise of this Court's powers under Supreme Court Rule 17 compels that the writ of certiorari be dismissed as improvidently granted. *Rice* v. *Sioux City Cemetery, supra,* 349 U.S. 77; see *Morris* v. *Weinberger,* 410 U.S. 422 (1973).

II

THE WRIT OF CERTIORARI SHOULD BE DISMISSED BECAUSE THE DECISION BELOW RESTS ON INDEPENDENT STATE GROUNDS

The leading California case on the duty of law enforcement officials to preserve evidence is *People* v. *Hitch,* 12 Cal.3d 641, 527 P.2d 361, 117 Cal.Rptr. 9 (1974). *Hitch* held that the investigative agency involved in administering a breathalyzer test for BAC has a duty to preserve and disclose the test ampoule collected. The court below relied heavily on *Hitch,* and petitioner's brief on the merits constitutes a frontal attack on *Hitch.* Petitioner complains that *Hitch* too broadly defines the circumstances under which evidence will be found to be (1) favorable to the defendant and (2) material on the issue of guilt. Brief for Petitioner at 23–26. Assuming, arguendo, that *Hitch* defines these concepts more broadly than does federal case law, an analysis of California authority shows that *Hitch* does so as a matter of

state law, not because of a misperception of federal constitutional requirements.

In *Hitch* the California Supreme Court took as its point of departure this Court's decisions in *Giglio* v. *United States,* 405 U.S. 150 (1971) and *Brady* v. *Maryland,* 373 U.S. 83 (1963), both of which rest on federal due process grounds. But the *Hitch* decision soon passed through federal due process terrain and arrived at territory enclosed by state law alone. This occurred when the court observed that the breath ampoules under discussion were "no longer in existence and the court is therefore unable to ascertain whether such evidence was, or would have been, favorable to the defendant and material on the issue of his guilt or innocence". 12 Cal.3d at 648; 527 P.2d at 366, 117 Cal.Rptr. at 14. In discussing the questions of favorability and materiality the California Supreme Court cited to the rules applied in the "cognate context" involving "the failure or refusal of the prosecution to disclose the identity of an informer where under similar circumstances it cannot be established that the informer's testimony, which is of course unknown, is favorable and material." *Ibid.* The court then explained that the rule it employed in such situations required the defendant simply to show a "reasonable possibility" that the anonymous informant could give evidence on the issue of guilt which "might" result in the defendant's exoneration. 12 Cal.3d at 649, 527 P.2d at 366, 117 Cal.Rptr. at 14. The court cited and relied solely on California authority which established the rule. 12 Cal.3d at 648–49, 527 P.2d at 366, 117 Cal.Rptr. at 14.

Specifically, *Hitch* cited *Price* v. *Superior Court,* 1 Cal.3d 836, 843, 463 P.2d 721, 83 Cal.Rptr. 369 (1970).

The heart of the *Hitch* case is its definition and analysis of the factors of favorability and materiality. California, under *Hitch,* has its own standards as to these two key factors, and those standards are independent from federal law. The fact that California has a different definition of materiality and favorability than that which flows from the federal constitution was recently reaffirmed in *Cordova* v. *Superior Court,* 148 Cal.App.3d 177, 195 Cal.Rptr. 758 (1983). *Cordova* involved the deportation of illegal aliens who, along with the defendant, had been arrested in a residence at which narcotics were found. Relying on the earlier California case of *People* v. *Mejia,* 57 Cal.App.3d 574, 129 Cal.Rptr. 192 (1976), defendant sought dismissal of various narcotics charges. In *Mejia* the court had ruled, under facts similar to *Cordova,* that the deportation of illegal aliens had deprived the defendant of material witnesses. *Mejia,* in turn, relied on the test for materiality which California applies to the failure to reveal the identity of informers. See 57 Cal.App.3d at 580, citing *Williams* v. *Superior Court,* 38 Cal.App.3d 412, 112 Cal.Rptr. 485 (1974), citing *inter alia, Price, supra.*

In *Cordova* the state argued that *Mejia* had been abrogated by this Court's decision in *United States* v. *Valenzuela-Bernal,* 458 U.S. 858 (1982). In *Valenzuela-Bernal* this Court placed on the defendant the burden of showing that a deported witness would have been material and favorable to the defense, a heavier burden than

California requires. *Id.*, at 870–71. The *Cordova* court accordingly reviewed California authority defining materiality and favorability in order to analyze whether the holding in *Valenzuela-Bernal* changed the California rule. It concluded that the concept, as defined both in the context of informers and in the "*Hitch*" context, "has, in effect and in practice, become a California doctrine of independent existence". 148 Cal.App.3d at 184, 195 Cal.Rptr. at 761. It therefore declined to follow *Valenzuela-Bernal.* 148 Cal.App.3d at 185, 195 Cal.Rptr. at 762. Thus, for example, in California, when the state loses test results of a drug's presence, and the loss makes it impossible for the defendant to show materiality, the dependant need only deny having ingested the drug. *People* v. *Moore,* 34 Cal.3d 215, 221, 666 P.2d 419, 193 Cal.Rptr. 404 (1983). But, as *Cordova* points out, this rule flows only from California's independent state test of materiality, not from principles of federal due process.

To summarize, if we accept petitioner's argument that *Hitch* and its progeny (which includes the case at bench) utilize a broader definition of materiality and favorability than that found in *Brady* and its progeny, it must in turn be concluded that the divergence flows from the fact that *Hitch's* test of materiality and favorability is based on independent state grounds. The question then becomes whether the writ of certiorari should be dismissed as improvidently granted because the decision below rests on independent state grounds.

In *Michigan* v. *Long,* ___ U.S. ___, 77 L.Ed.2d 1201 (1983), this Court discussed the situations under which

it will find lack of jurisdiction because the decision below rests on independent state grounds. The test set forth in *Long* is that where "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed federal law required it to do so". 77 L.Ed.2d at 1214. In arriving at this test the Court weighed and balanced competing policies. On one hand, the test takes into account the court's traditional "[r]espect for the independence of state courts, as well as the avoidance of rendering advisory opinions". *Ibid.* On the other hand, the test takes into account the Court's obligation to determine the validity under the federal constitution of the state action. *Id.*, at 1215.

This Court in *Long* did not abandon the established doctrine that it must determine for itself whether a state court decision rests on an adequate nonfederal basis and that in doing so, it is not bound by the view taken by the state court. *Staub* v. *Baxley,* 355 U.S. 313, 318 (1958); *First National Bank* v. *Anderson,* 269 U.S. 341, 346 (1926). Here the California court of appeal stated that the "*Hitch* rule implements a federal due process standard". J.A. 158. The court below engaged in no analysis of the state law underpinnings of *Hitch* in so concluding. Yet, as previously demonstrated, *Hitch's* own analysis of *Brady* sprang from California law and thus parted com-

pany with federal law from the outset. Further, as noted, recent California decisional law makes clear that the test for materiality and favorability in the informant context, the deported-witness context and the *Hitch* context, is grounded on state law. *Cordova, supra.* Therefore, amicus respectfully submits that the court of appeal was incorrect and that a close study of *Hitch* and its progeny plainly reveals that it is founded on state law.

> This Court, . . ., reviews judgments, not statements in opinions. . . . At times, the atmosphere in which an opinion is written may become so surcharged that unnecessarily broad statements are made. In such a case, it is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests. This means no more than we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds.

Black v. *Cutter Laboratories,* 351 U.S. 292, 297–98 (1956).

In sum, while the court below made a "plain statement", *Michigan* v. *Long, supra,* 77 L.Ed.2d at 1214–15, that its decision was based on federal due process, in reality, its decision—based as it was on *Hitch*—was founded on adequate state grounds.

Although this Court in *Long, supra,* has noted that it will look no further than the face of the lower court's opinion, it must not blind itself to the true nature of the issues before it either by accepting an erroneous statement by the court of appeal or by failing to acknowledge the impact of intervening state decisional law which clarifies the existence of adequate state grounds. *Black*

v. *Cutter Laboratories, supra; People* v. *Cordova, supra.*[7] This Court, in an analogous context, dismissed as improvidently granted the writ of certiorari in *Piccirillo* v. *New York, supra,* 400 U.S. at 549, because an intervening state court decision clarified the status of New York law. Thus, after briefing and oral argument in *Piccirillo,* a state court of appeal's decision was rendered making it clear that transactional immunity is required in New York and, significantly, indicating that such court's earlier decision in the case at bar may have rested on the premise that immunity was required. *Id.,* at 548–49. This Court therefore dismissed the writ of certiorari.

The principles of *Michican* v. *Long, supra,* regarding the "plain statement" rule, 77 L.Ed.2d at 1215, n. 7, similarly apply to the plain statement of a state case, decided after the lower court's opinion, that the doctrine under review rests on independent state grounds. Applying such an analysis to the case at bar, it appears that since *Hitch* and its progeny rest on California law for their adaptation of *Brady* principles, the writ of certiorari should be dismissed as improvidently granted. *Jankovich* v. *Indiana Toll Road Commission,* 379 U.S. 487 (1965); *Wilson* v. *Loew's, Inc.,* 355 U.S. 597 (1958); see *Cook* v. *Hudson, supra.*

[7] For a discussion of the effect of intervening court decisions or statutory changes, see, *supra,* argument I.

III

THE STATE HAS AN OBLIGATION UNDER THE FEDERAL DUE PROCESS CLAUSE TO PRESERVE MATERIAL EVIDENCE IN ITS POSSESSION

In a broad-based attack, never made below, petitioner now primarily denies that it has any constitutional duty to preserve physical evidence it has taken into its possession in the investigation of a criminal offense. Amicus contends that decisions recognizing such a duty to preserve evidence are simply logical extensions of this Court's rulings in *Brady* v. *Maryland, supra,* and other decisions "in what might loosely be called the area of constitutionally guaranteed access to evidence". *United States* v. *Valenzuela-Bernal, supra,* 458 U.S. at 867.

In *Brady, supra,* this Court held that the prosecution has a duty to disclose, upon request, all evidence favorable to the accused and material either to guilt or punishment. See also *Moore* v. *Illinois,* 408 U.S. 783, 794 (1972). The rule was later clarified in *United States* v. *Agurs,* 427 U.S. 97 (1972). There it was emphasized that the overriding concern of the *Brady* rule is the "justice of the finding of guilt". *Id.,* at 112. To the extent suppression of evidence results in denial of a fair trial, it violates due process. *Id.,* at 114. In *Agurs,* three situations involving application of the *Brady* rule were analyzed, and this Court essentially established a balancing test which takes into account the materiality of the evidence, its likely impact on the truth-seeking function of the trial process and the prosecutor's knowledge of the first two factors.

The first situation is when undisclosed evidence shows that the prosecutor knew or should have known the government case included perjured testimony. Because of the corruption of the truth-seeking function of the trial, strict standards of materiality are enforced. *Id.*, at 103–04.[8] The second situation involves pretrial requests for specific evidence. The function of the request is to give the prosecution notice that the defense considers the evidence material. In those situations, evidence is deemed material if it "might have affected the outcome of the trial". *Id.*, at 104. When such requests are made and the evidence is material or there is a "substantial basis" for believing it to be so, the prosecutor must disclose it or submit the matter to the trial court. *Id.*, at 106.[9]

Finally, where no request is made or the request is so general that it does not really inform the prosecution of what the defense wants, the prosecutor is not expected to be able to recognize every item of evidence which might affect the outcome of the trial. In this situation, the prosecutor is expected to exercise pretrial judgment and resolve doubtful questions in favor of disclosure. *Id.*, at 108. But whether the prosecutor has violated the duty to disclose must be assessed in light of the impact the non-disclosed evidence has on the finding of guilt. If it creates a reasonable doubt, the judgment must be reversed. *Id.*, at 112–113.

In *United States* v. *Bryant*, 439 F.2d 642 (D.C. Cir. 1971), the reasoning of which was found persuasive in

[8] In those cases, reversal is required if there is any reasonable likelihood the false testimony could have affected the verdict. *Id.*, at 103.

[9] Cf. *United States* v. *Heiden*, 508 F.2d 898 (9th Cir. 1974).

People v. *Hitch, supra,* the court applied the reasoning of *Brady* in the context of lost evidence. The court found that the duty to disclose favorable evidence upon request was meaningless if it could be circumvented by the expedient of destroying the evidence before it was requested. It therefore held that "before a request for discovery has been made, the duty of disclosure is operative as a duty of preservation". 439 F.2d at 651.

The duty of preservation established in *Bryant* thus goes to that body of evidence described by the second situation in *Agurs, supra.* This Court stated there that the prosecution, upon request, must disclose evidence which might affect the outcome of the trial. *Bryant* simply says that such evidence may not be destroyed before the request occurs. *Bryant,* however, does not require that every loss of evidence be deemed a violation of due process. Relying on *United States* v. *Augenblick,* 393 U.S. 348 (1969), the court further held that loss or destruction of evidence does not violate due process concepts if the government shows that it has developed rigorous procedures designed to preserve the evidence and has followed the procedures in good faith. 439 F.2d at 651–652.

In the wake of *Bryant,* concerns were raised about the problem later addressed in *Agurs,* that is, how were investigating agencies to know which evidence to preserve? The pragmatic judicial response evidences concern that no insuperable burdens be placed on investigating agencies. In *Bryant* itself, the evidence was characterized as highly relevant as it was crucial to guilt or innocence. But in keeping with the idea that it is not

the prosecutor's function to determine what evidence is necessary for an adequate defense,[10] the court established a duty to preserve all evidence that "might be favorable". *Id.*, at 652, n. 21, and related text. In California, the evidence must be saved "if there is a reasonable possibility that it would be favorable to the defendant on the issue of guilt or innocence". *People* v. *Hitch, supra,* 12 Cal.3d at 649, 527 P.2d at 367, 117 Cal.Rptr. at 15; *People* v. *Nation,* 26 Cal.3d 169, 176, 604 P.2d 1051, 1054, 161 Cal.Rptr. 299, 302 (1980).

But courts have been practical in applying the rules. The state has no duty to preserve when its officers cannot reasonably be expected to know that what they possess is material evidence. *Robinson* v. *Superior Court,* 76 Cal. App.3d 968, 975, 143 Cal.Rptr. 328, 332 (1978).[11] On the other hand, some classes of evidence have been held to be so crucial as to always be material. See, e.g., *People* v. *Moore, supra,* 34 Cal.3d at 221, 666 P.2d. at 422, 193 Cal.Rptr. at 407 (urine samples in probation violations involving use of drugs); *People* v. *Nation, supra,* (semen sample in rape case); *United States* v. *Harrison, supra,* (rough notes of witness interviews). The cases thus show an appreciation of the concerns prompting the notice requirement which were explicated in *Agurs.*

Bryant and progeny have simply been logical exten-

[10] *Griffin* v. *United States,* 183 F.2d 990, 993 (D.C. Cir. 1950); *United States* v. *Harrison,* 524 F.2d 421, 428 (D.C. Cir. 1975).

[11] See also *People* v. *Hogan,* 31 Cal.3d 815, 851, 647 P.2d 93, 114, 183 Cal.Rptr. 817, 838 (1982); *State* v. *Clements,* 52 Or.App. 309, 628 P.2d 433 (1981); *State* v. *Maloney,* 105 Ariz. 348, 464 P.2d 795, 797-798 (1970).

sions of *Brady* and *Agurs,* necessary to effectuate the spirit of those cases and, more importantly, to obtain that which was their overriding concern: a fair trial through an uncorrupted fact-finding process. Yet, petitioner herein, citing *United States* v. *Augenblick, supra,* claims that no due process duty of preservation exists. *Augenblick,* however, did not state that no duty exists; it stated there was no violation because the government successfully bore its burden of showing why the evidence could not be produced. 393 U.S. at 355–356.

Petitioner's effort to establish its right to destroy physical evidence with impunity ignores the plethora of cases, both state and federal, which recognize the State's duty under the federal Due Process Clause to preserve material evidence in its possession.[12] While these deci-

[12] See *United States* v. *Picariello,* 568 F.2d 222 (1st Cir. 1978); *United States* v. *Miranda,* 526 F.2d 1319 (2d Cir. 1975); *Virgin Islands* v. *Testamark,* 570 F.2d 1162 (3d Cir. 1978); *Armstrong* v. *Collier,* 536 F.2d 72 (5th Cir. 1976); *United States* v. *Coe,* 718 F.2d 830 (7th Cir. 1983); *United States* v. *Doty* 714 F.2d 761 (8th Cir. 1983); *United States* v. *Sentovich,* 677 F.2d 834 (11th Cir. 1982); *Lauderdale* v. *State,* 548 P.2d 376 (Alas. 1976); *Scales* v. *City Court,* 122 Ariz. 231, 594 P.2d 97 (1979); *Garcia* v. *District Court,* 197 Col. 38, 589 P.2d 924 (1979); *Deberry* v. *State,* 457 A.2d 944 (Del. Super. 1983); *State* v. *Maluia,* 57 Haw. 428, 539 P.2d 1200 (1975); *People* v. *Bennett,* 82 Ill.App.3d 233, 402 N.E.2d 650 (1980); *Hale* v. *State,* 248 Ind. 630, 230 N.E.2d 432 (1967); *Tobias* v. *State,* 37 Md.App. 605, 378 A.2d 698 (1977); *State* v. *Brown,* 337 N.W.2d 507 (Iowa 1983); *People* v. *Eddington,* 53 Mich. App. 200, 218 N.W.2d 831 (1979); *State* v. *Hill,* 287 N.W.2d 918 (Minn. 1979); *State* v. *Craig,* 169 Mont. 150, 545 P.2d 649 (1976); *State* v. *Havas,* 95 Nev. 706, 601 P.2d 1197 (1979); *State* v. *Washington,* 165 N.J. Super. 158, 397 A.2d 1101 (1979); *Trimble* v. *State,* 75 N.M. 183; 402 P.2d 162 (1965); *State* v. *Larson,* 313 N.W.2d 750 (N.D. 1981); *State* v. *Clements,* supra; *Comm.* v. *Chapman,* 255 Pa. Super. Ct. 265, 386 A.2d 944 (1978); *State* v. *Parker,* 263 N.W.2d 679 (S.D. 1978); *State* v. *Wright,* supra; *State* v. *Amundson,* 69 Wis. 2d 554, 230 N.W.2d 775 (1975).

sions do not all agree on what constitutes "material evidence" or what degree of prejudice need be shown in order to reverse a conviction, they all disagree with petitioner's contention that the State has no duty to preserve material physical evidence in its possession.

Conceding that due process is not a static concept, petitioner would nonetheless have this Court ignore the fact that so many courts before it have considered the preservation of physical evidence so basic to the concept of a fair trial that they have held or assumed it was compelled by the Due Process Clause. "[D]ue process is . . . measured . . . by that whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct". *Breithaupt* v. *Abram,* 352 U.S. 432, 436 (1957). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the state's accusations". *Chambers* v. *Mississippi,* 410 U.S. 284, 294 (1973). Without the opportunity to examine and retest physical evidence upon which the prosecution case is based, at least where that evidence is subject to varying expert opinion, an accused does not have a fair opportunity to defend against the charges. *Barnard* v. *Henderson,* 514 F.2d 744, 746 (5th Cir. 1975).

The existence of the duty to preserve does not depend solely on the *Brady/Agurs/Bryant* line of cases. It also finds support in *United States* v. *Valenzuela-Bernal, supra,* and cases discussed therein.

In *Valenzuela-Bernal,* this Court assessed the defendant's claim that he had been denied both due process

and the right to compulsory process when the government deported two witnesses to his crime before the defense had the opportunity to interview them. *Valenzuela-Bernal* held that the government had no absolute duty to detain the witnesses; this holding was a recognition of the government's duty to enforce the immigration laws. *Id.*, at 864–66. Yet implicit in the decision is the notion that the government had the duty not to deport the witnesses if they could supply material evidence. Thus, sanctions were held appropriate if the defendant could show that the deportation deprived him of material, favorable evidence. *Id.*, at 873–74. Citing the language of *Augenblick, supra,* this Court stated that if the defendant could have shown that the witnesses' testimony would have been favorable and material, he would have shown a due process violation that so infected the fairness of the trial as to make it "more a spectacle or trial by ordeal than a disciplined contest." *Id.*, at 872.[13]

In recognition of the fact that the defendant had no access to the witnesses, *Valenzuela-Bernal* found it proper to relax the degree of specificity required in showing materiality compared to that required in a *Brady* situation or in a situation where the defendant claims impairment of the ability to mount a defense due to post-indictment delay. *Id.*, at 869–70. See *Barker* v.

[13] This clarification of the cited language in *Augenblick* makes clear that petitioner's reliance on it, on *United States* v. *Loud Hawk*, 628 F.2d 1139, cert. den. 445 U.S. 917 (9th Cir. 1979), *United States* v. *Ortiz*, 602 F.2d 76 (9th Cir. 1979), and on *United States* v. *Traylor*, 656 F.2d 1326 (9th Cir. 1981), is misplaced. While establishing a rule requiring preservation of evidence akin to the rules the other circuit courts found implicit in the concept of due

Wingo, 407 U.S. 514 (1972).

Finding the deported witness situation more closely analogous to the undisclosed informer situation,[14] this Court held that the same showing of materiality should be applied in order to obtain sanctions: the defendant must make some plausible showing that the deported witnesses' testimony would have been material and favorable. *Id.*, at 873–74. A showing of the events to which the witness might testify, and the relevance of those events to the crime charged, may demonstrate the required materiality. *Id.*, at 871. Reversal is required if there is a "reasonable likelihood that the testimony could have affected the trier of fact." *Id.*, at 873–74.

Valenzuela-Bernal and other "access to evidence" cases cited therein implicitly recognize the prosecutor's duty to retain material evidence for the use of the defense and require sanctions for violation of the duty. Although it places a heavier burden upon the defendant, *Valenzuela-Bernal*'s "plausible showing" of materiality requirement is analogous to that established in *Hitch*, 12 Cal. 3d at 649, 527 P.2d at 367, 117 Cal.Rptr. at 15, and, in the context of physical evidence, is simply another way of stating the rule of *Barnard* v. *Henderson, supra*,

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process, the Ninth Circuit in *Loud Hawk* held that its rule was not of constitutional dimension. It cited *Augenblick* for the proposition that destruction of evidence will rarely reduce the proceedings to "a spectacle or trial by ordeal" and, thus, a violation of due process. 628 F.2d at 1153–53. As discussed, *infra*, *Valenzuela-Bernal* holds that the *Augenblick* standard is met if the defendant makes a plausible showing that the lost evidence would have been favorable and the court concludes that there is a reasonable likelihood the favorable evidence could have affected the trier of fact.

[14] See *Roviaro* v. *United States*, 353 U.S. 53 (1957); *McCray* v. *Illinois*, 386 U.S. 300 (1967).

i.e., a criminal defendant has the due process right to have an independent expert examine a critical piece of evidence whose nature is subject to varying expert opinion. 514 F.2d at 746. [15]

Assuming the police "possessed" the evidence, the court below had ample evidence to conclude that the breath samples were subject to varying expert analyses, that the defendants had made a "plausible showing" of materiality and favorability, or that there was a reasonable possibility that the evidence would be favorable to the defendants on the issue of guilt or innocence. On the question of "possession" the *Trombetta* court simply disagreed with *People* v. *Miller*, 52 Cal.App.3d 666, 125

[15] The court below had evidence before it that varying expert opinion was possible regarding BAC. None of the devices approved for testing the alcoholic content of breath is infallible. J.A. 188. The Intoxilyzer is not specific for ethanol. *Ibid.* Rather, it reacts positively to six common solvents found in foods, the body or the laboratory, including acetone, butane, isopropyl alcohol and the ingredients in gasoline. J.A. 189. The machine could react positively if a person had inhaled butane from a cigarette lighter or had gasoline on his or her clothing at the time of the test. J.A. 190.

Moreover, the evidence was unquestionably crucial to a prosecution for driving under the influence. In most criminal violations physical evidence can include a variety of things. It is difficult for the police to know at the initial stages of the investigation which of these items of physical evidence will prove to be of importance, and when such a determination is made the physical evidence is usually intact for forensic analysis. But in an investigation for drunk driving, the police know that a sample of the suspect's breath will be the crucial, indeed the only, physical evidence, and it is obvious to all that when a breath sample is taken the suspect will have no meaningful opportunity later to retest a valid sample unless the police either obtain an extra sample along with the one they will use for testing or save some of the sample they test. Indeed, in California, it has been established for a decade that the results of breath tests are material and crucial to a fair trial. *People* v. *Hitch, supra,* 12 Cal.3d at 647, P.2d at 365–66, 117 Cal. Rptr. 13–14.

Cal.Rptr. 341 (1975), which held that the evidence was not possessed. While this Court may or may not agree with the *Trombetta* court on this issue, that finding is irrelevant to the question of whether there exists a general duty to preserve material evidence in the state's possession. If the due process right to a fair trial is to be meaningful, criminal defendants must have the opportunity to test critical physical evidence in the hands of the state, especially when, as here, the results of scientific analysis of the evidence by the prosecution are presumptive or conclusive evidence of guilt.

IV

REGARDLESS OF HOW IT IS CHARACTERIZED SEMANTICALLY, *BRADY* SHOULD BE APPLIED TO COVER THIS TYPE OF EVIDENCE IN LIGHT OF ITS UNIQUE AND FUNDAMENTAL CHARACTER

This case involves a unique and limited factual setting. Yet at issue is the defendant's right to a fair trial and the integrity of the fact-finding process. The results of breath tests are fundamental and crucial in prosecutions for driving under the influence of alcohol. Petitioner recognizes this and so does law enforcement. So important is this type of evidence that the state compels the drunk driving suspect to produce it. That suspect has no right to refuse to turn over a sample of his or her breath upon demand. But when the state is asked to return it so that the defendant can analyze it, it refuses. Indeed, the state has taken great care to obtain the breath in such a manner that it is destroyed after the testing de-

spite the ready availability of inexpensive, approved devices for its collection which would enable the defendant to have access to this crucial evidence.

Such conduct is simply unfair. Although much ado has been made about the semantics of this process, amicus urges this Court to apply the due process principles of *Brady v. Maryland, supra,* to this limited and narrow factual setting, regardless of whether the behavior by law enforcement is characterized as "gathering" or "preserving". Because of the strictly circumscribed parameters of the breath test issue, its central role in the fact-finding process, and the potential for widely varying results of expert testing, *Brady* and its progeny should apply. In short, the state should not be allowed to build its case against the defendant and then hide the critical cornerstone of physical evidence from him or her.

CONCLUSION

Amicus respectfully submits that this Court should dismiss the writ of certiorari as improvidently granted. Alternatively, the judgment of the California Court of Appeal should be affirmed.

Respectfully submitted,

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